

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
FEDERAL WAY SCHOOL DISTRICT #210

Appellant

v

PUGET SOUND AIR POLLUTION  
CONTROL AGENCY,

Respondent

PCHB No. 86-164

FINAL FINDINGS OF FACT  
CONCLUSIONS OF LAW AND  
ORDER

This matter, the appeal of Notice of Violation No. 021615 for alleged violations of asbestos removal regulations, came on for hearing before the Pollution Control Hearings Board; Lawrence J. Faulk, Chairman and presiding officer, Wick Dufford, and Judith Bendor, Members, on November 21, 1986, in Lacey, Washington. Respondent elected a formal hearing.

Appellant, Federal Way School District #210 was represented by its

1 attorney, James M. Thrasher. Respondent Agency was represented by  
2 Keith D. McGoffin, Attorney at Law. The proceedings were transcribed  
3 by Gene Barker and Associates.

4 Witnesses were sworn and testified. Exhibits were examined. From  
5 the testimony, exhibits and contentions of the parties, the Pollution  
6 Control Hearings Board makes these

7 FINDINGS OF FACT

8 I

9 Appellant Federal Way School District #210 owns Mirror Lake  
10 Elementary School at 625 South 314th Street, Federal Way, in King  
11 County, Washington.

12 II

13 Respondent Puget Sound Air Pollution Control Agency (PSAPCA) is a  
14 municipal corporation with responsibility for administering a program  
15 of air pollution prevention control in a multi-county area which  
16 includes King County and the site of the elementary school which is  
17 the focus of this dispute.

18 PSAPCA has filed with this Board a certified copy of its  
19 regulations of which the Board takes official notice.

20 III

21 On January 13, 1986, appellant entered into a contract with  
22 Pre-Con Enterprises Inc. for the modernization of the Mirror Lake  
23 Elementary School. On June 20, 1986, the School was turned over to  
24 the contractor by appellant school district. No school district  
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1 personnel or students remained in the building after that date except  
2 for periodic inspection of the construction in progress by the owner's  
3 representative.

4 The bid specifications on which the contract was awarded  
5 identified some of the asbestos insulation which would have to be  
6 removed. Additional asbestos, discovered during the project, was also  
7 to be removed. All rules and regulations of the EPA and pollution  
8 control agencies were to be adhered to. The asbestos removal work was  
9 subcontracted to M.A. Griffin Mechanical.

#### 10 IV

11 Under the contract with the school district, the general  
12 contractor was responsible for obtaining permits and complying with  
13 applicable legal requirements. The district did not directly  
14 supervise the work of the contractor or subcontractors. The specific  
15 removal work resulting in the violations at issue was not done at the  
16 district's immediate direction.

#### 17 V

18 On July 22, 1986, appellant's representative, on a visit to the site,  
19 observed signs of asbestos removal work not following the normally  
20 approved methods. This was reported to respondent PSAPCA. As a  
21 result of this phone call, an agency inspector, arrived at the school  
22 and thereupon conducted an inspection. The inspector observed loose,  
23 dry, and friable asbestos on a classroom floor. He collected some  
24 samples. The inspector observed wet sealant in other areas of  
25

1 asbestos removal, but there was no evidence of sealant in the areas  
2 where samples were collected. PSAPCA's inspector took photographs of  
3 the scene.

#### 4 VI

5 PSAPCA's inspector observed that the entire building was closed  
6 off to prevent the public from entering inadvertently. However, no  
7 asbestos warning signs nor any plastic containment areas were found on  
8 the July 22, 1986 inspection. During his inspection, there was no  
9 work crew present on site.

#### 10 VII

11 On July 23, 1986, PSAPCA's inspector conducted a follow-up  
12 inspection at the Mirror Lake Elementary School and found that the  
13 area was being properly cleaned, and that asbestos warning signs had  
14 been posted around the school.

#### 15 VIII

16 Asbestos is one of only six pollutants classified federally as a  
17 "hazardous air pollutant." Under Section 112 of the Federal Clean Air  
18 Act, the term describes a substance which

19  
20 causes, or contributes to, air pollution which may  
21 reasonably be anticipated to result in an increase in  
22 mortality or an increase in serious irreversible, or  
incapacitating reversible, illness.

23  
24 Asbestos, then, is very dangerous indeed. It is the subject of a

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1 special set of work procedures and emission limitations promulgated  
2 federally called National Emission Standards for Hazardous Air  
3 Pollutants. The threshold for regulation is any material containing  
4 more than one (1) percent asbestos.

5 PSAPCA has adopted its own set of regulations for the removal and  
6 encapsulation of asbestos material, designed to be at least as  
7 stringent as the federal standards. PSAPCA, Regulation I, Article 10.

8 The samples taken from Mirror Lake Elementary School on July 22,  
9 1986, were, on analysis, shown to contain far more than 1% asbestos.

10 IX

11 On August 19, 1986, PSAPCA mailed notice of violation No 021615 to  
12 appellant, Pre-Con Enterprises and M.A. Griffin Mechanical. The  
13 notice of violation alleged a violation of requirements for removing  
14 and disposing of asbestos.

15 X

16 Federal Way School District filed its appeal of this notice of  
17 violation with this Board on September 16, 1986. Pre-Con Enterprises  
18 and M.A. Griffin Mechanical did not appeal. Appellant does not  
19 contest the violations themselves, but argues that it should not be  
20 held legally responsible for them.

21 XI

22 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
23 adopted as such.

24 From these Findings of Fact, the Board comes to these

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1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over the subject matter and the  
4 parties. Chapter 43.21B RCW. The case arises under regulations  
5 implementing the Washington Clean Air Act, chapter 70.94 RCW.

6 II

7 Notice of Violation No. 02615 asserts three violations of Article  
8 10 of PSAPCA's Regulation I on July 22, 1986: (1) a violation of  
9 Section 10.04(b)(2), III(A), for failure to adequately wet the  
10 asbestos until it was collected for disposal; (2) a violation of  
11 Section 10.04(b)(2), III(B) for failure to collect asbestos at the end  
12 of each working day; and (3) a violation of Section 10.04(b)(2),  
13 III(C) for failure to contain the removed asbestos in a controlled  
14 area until transported to a waste disposal site.

15 We conclude that the three regulatory sections cited were, indeed,  
16 violated during the removal operation at issue on July 22, 1986.

17 III

18 We also conclude, under the facts, that the asbestos removal work  
19 in question was performed by an independent contractor. The sole  
20 issue presented to this Board is whether the school district can be  
21 held legally responsible for the violations.

22 IV

23 The Board has wrestled with the question of the delegability of  
24 the duty to conform to regulatory requirements. E.g., American

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1 Transport & Mobil Oil v. PSAPCA, PCHB 84-266 and 84-269 ( June 12,  
2 1985); National Food Corporation v. SCAPCA, PCHB 84-249 et sec.  
3 (October 10, 1985). The Court of Appeals provided some guidance in  
4 December 1985 in Sea Farms, Inc. v. Foster & Marshall Realty, 42 Wn.  
5 App. 308, 711, P.2d 1049 (1985), concluding that the Washington Water  
6 Pollution Control Act imposes a statutory non-delegable duty not to  
7 "permit or suffer" pollution of state waters.

8 Analogizing from Sea Farms, we thereafter decided that the  
9 Washington Clean Air Act imposes a similar non-delegable duty <sup>1)</sup> in  
10 connection with cases involving the removal of catalytic converters in  
11 automotive shops. Tune Up & Lube King v. DOE, PCHB 85-183 (February  
12 24, 1986); Kenmore Muffler v. DOE, PCHB 85-217 (July 7, 1986).

13 V

14 We are convinced that the duty which applies in this case is  
15 non-delegable. Asbestos is a substance which has been specially  
16 recognized for its ultrahazardous properties. This factor of  
17 extraordinary or "inherent" dangerousness can be critical in  
18 determining the delegability of duties, and has influenced our  
19 thinking in this and other cases dealing with asbestos removal.  
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23 1) Compare RCW 90.48.080 and RCW 70.94.040.  
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1 VI

2 Under the facts and circumstances, we conclude that Notice of  
3 Violation No. 021615 should be upheld; and that appellant Federal Way  
4 School District #210 should not be dismissed therefrom.

5 VII

6 The facts presented here involve an extremely hazardous  
7 substance. We do not hereby decide whether violations concerning less  
8 dangerous substances are or are not governed by the non-delegable duty  
9 principle.

10 VIII

11 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
12 adopted as such.

13 From these Conclusions of Law, the Board enters this  
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ORDER


Notice of violation No. 021615 issued by PSAPCA to Federal Way  
School District #210, and is affirmed

DONE this 28<sup>th</sup> day of January, 1987.

POLLUTION CONTROL HEARINGS BOARD

 1/28/87  
LAWRENCE J. FAULK, Chairman

  
WICK DUFFORD, Member

  
JUDITH BENDOR, Member

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